

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

First American Title Insurance Company,

Case No. 2:15-cv-00832-RFB-VCF

Plaintiff,

V.

Commerce Associates, LLC et al,

ORDER

Defendants.

I. INTRODUCTION

Before the Court is Plaintiff's renewed Motion for Partial Summary Judgment (ECF No. 90).

II. PROCEDURAL BACKGROUND

On May 4, 2015, Plaintiff filed the current suit against Commerce Associates, LLC; TG Investments, LLC; and Does 1 through 10. EFC No. 1.

On August 26, 2015, Defendants filed a Motion to Dismiss, for failure to state a claim. EFC No. 27. On February 18, 2016, the Court granted in part and denied in part the Motion to Dismiss; the Court allowed all causes of action to proceed with the exception of the unjust enrichment claim, which was dismissed without prejudice. ECF No. 50.

Plaintiff filed a First Amended Complaint on May 5, 2016. ECF No. 56. A scheduling order issued on May 20, 2016. ECF No. 63. The discovery cut-off date was set for October 11, 2016.

Plaintiff filed a Second Amended Complaint on August 15, 2016. ECF No. 72.

Plaintiff filed the instant Motion for Partial Summary Judgment on November 9, 2016, seeking summary judgment on Plaintiff's third and fourth counts, unjust enrichment and breach of

1 contract, respectively. ECF No. 90. Defendants filed a Response on December 9, 2016, and
 2 Plaintiff replied on December 23, 2016. ECF Nos. 93, 96. A hearing on the motion was held on
 3 August 28, 2017 at which the Court deferred ruling on the motion. ECF No. 104. The Court denied
 4 the motion without prejudice on September 29, 2017, permitting Plaintiff to re-file after trial. ECF
 5 No. 105.

6 The parties filed a joint proposed pretrial order on November 17, 2017 (ECF No. 108) and
 7 trial was subsequently scheduled and postponed several times. In preparation for trial, the parties
 8 filed motions in limine. ECF Nos. 121, 131, 132, 139. Further, on July 1, 2019, Plaintiff filed a
 9 Motion for Leave to File a Renewed Motion for Partial Summary Judgment, seeking to renew its
 10 Motion for Summary Judgment and representing that if granted leave and if its motion for
 11 summary judgment were granted, it would voluntarily dismiss its remaining claims against
 12 Defendants. ECF No. 144 at 3-4.

13 The Court held a pretrial conference on February 18, 2020, to discuss the Motions in
 14 Limine as well as Plaintiff's Motion for Leave to File a Renewed Motion for Partial Summary
 15 Judgment, vacated the trial set for February 24, 2020, and took the motion to renew under
 16 submission. ECF No. 155. At the hearing, the Court denied Plaintiff's claim, pertinent to the instant
 17 motion, as to fraudulent transfer. ECF No. 157 at 5-7. On March 3, 2020, the Court denied the
 18 Motions in Limine without prejudice and granted in part the Motion for Leave to File a Renewed
 19 Motion for Partial Summary Judgment. ECF No. 156. The Court permitted the parties to each file
 20 a supplement to the briefing on the original Motion for Partial Summary Judgment (ECF No. 90)
 21 and set a pretrial conference for April 15, 2020. *Id.* The Court stated that it would not consider
 22 subsequent arguments that could have been brought in the initial briefing. ECF No. 157 at 77-78.

23 Both parties filed supplemental briefs on March 10, 2019. ECF Nos. 159, 160. On April 7,
 24 2020, the Court vacated the pretrial conference and jury trial in light of the global pandemic and
 25 set a status conference for June 2020. ECF No. 161. The status conference was again vacated and
 26 scheduled for July 14, 2020. ECF No. 163.

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III. FACTUAL BACKGROUND

The following facts are undisputed:

a. Undisputed Facts

4 In 2004, Commerce was the master developer of a mixed use planned community in
5 Henderson, Nevada known as “Tuscany.” ECF No. 90-1 at 2 (citing ECF No. 76, ¶ 9; ECF No.
6 82, ¶ 9). In December 2004, Commerce entered into a written agreement with the City of
7 Henderson (the “City”) which required Commerce to complete the third phase of a water drainage
8 facility commonly known as the “C-1 Channel” which carried storm water runoff from Tuscany
9 and other properties (the “C-1 Channel Phase 3 Agreement”). Id. (citing ECF No. 72-1, ¶ B; ECF
10 No. 76, ¶¶ 9-10; ECF No. 82, ¶¶ 9-10) (noting ECF No. 72-1 is the C-1 Channel Phase 3
11 Agreement). The C-1 Channel Phase 3 Agreement also required Commerce to pay the City the
12 sum of \$934,000 (the “C-1 Impact Fee”). Id. (citing ECF No. 72-1, ¶¶ 3.1, 3.3; ECF No. 76, ¶ 10;
13 ECF No. 82, ¶ 10).

Article III of the Agreement, laying out the obligation to the City, reads as follows:

3.1 Commerce Phase 3 Monetary Obligations: The Parties acknowledge that they have discussed the impact, attributable to Tuscany, that water drainage from the C-1 Channel will have on the Las Vegas Wash. Based on those discussions and having due regard for the impact of Tuscany drainage on the Las Vegas Wash as well as the overall health, safety and management of the Las Vegas Wash, the Parties have agreed that the sum of \$934,000 (the “C-1 Impact Fee”) is an appropriate contribution to be made by Commerce, on behalf of Tuscany, to the City for Las Vegas Wash improvements related to the effect, at the C-1 Channel “Confluence” or “Convergence”, of Tuscany’s use of the C-1 Channel and its impact on the Las Vegas Wash.

3.2 Interlocal Agreement. The City represents that it has discussed, with SNWA [Southern Nevada Water Authority], the impact of the C-1 Channel on the Las Vegas Wash and the amounts to be contributed by Commerce on behalf of Tuscany, and that SNWA and the City have approved the amount of the C-1 Impact Fee. Promptly following the approval of this Agreement, the City agrees to enter into an Interlocal Agreement with SNWA for the purpose of approving the provisions of this Agreement insofar as they affect the Las Vegas Wash in order to establish any and all construction, financial or other obligations of Commerce and any other owners within Tuscany with respect to the Las Vegas Wash, including improvements or costs related thereto at the C-1 Channel “Confluence” or

1 “Convergence”.

2 3.3 Payment of the C-1 Impact Fee. Commerce shall pay the C-1 Impact Fee to the
3 City, or as the City may direct in accordance with the Interlocal Agreement, in two
4 installments of \$467,000. The first installment shall be due and payable on May 31,
5 2005 and the final installment shall be due and payable on November 30, 2005.

6 3.4 Limitation. The Commerce Phase 3 Obligations shall be limited to the
7 obligations set forth in Section 2.2 and 3.3. Without limiting the foregoing, other
8 than the payment of the C-1 Impact Fee, neither Commerce nor any other property
9 owner within Tuscany shall be obligated to make or pay for any improvement to
10 the Las Vegas Wash or to make or pay any amount on account of the development
11 of Tuscany in accordance with the Tuscany Land Use approval.

12 ECF No. 90-10 at 6-7. Article II stated in pertinent part:

13 2.2. Construction of Phase 3. Following the approval of the Phase 3 Plans by the
14 City of Henderson and payment by Commerce of fees and placement of bonds, as
15 described in Paragraph 2.3 below for Phase 3, Commerce shall cause Phase 3 to be
16 constructed in a good and workmanlike condition, lien free and in accordance with
17 the approved Phase 3 Plans. Commerce shall use commercially reasonable efforts
18 to construct Phase 3 in a prompt time period. For purposes of clarification, the
19 construction obligations of Commerce with respect to Phase 3 do not proceed
20 beyond the “sheet piling” at the end of the cut off wall, as set forth on the Phase 3
21 Plans, it being the intention of the Parties that the Commerce Phase 3 Obligations
22 with respect to construction not include any work or improvements to or within the
23 Las Vegas Wash itself.

24 *Id.* at 6. Commerce did not pay this C-1 Impact Fee. ECF No. 90-1 at 2 (citing Jankowiak Dep.
25 14:17-15:7; Fullmer Dep. 28:25-29:9; Commerce Response to Interrogatory No. 7).

26 In December 2012, Commerce sold a portion of the Tuscany project to non-party
27 Greystone Nevada, LLC (“Greystone”) pursuant to the terms of a written purchase and sale
28 agreement (the “Purchase Agreement”). *Id.* at 3 (citing ECF No. 72-5; ECF No. 76, ¶¶ 12, 37; ECF
 No. 82, ¶¶ 12, 37; Dep. Ex. 1) (footnote omitted). Commerce did not disclose to Greystone that it
 had failed to pay the C-1 Impact Fee. *Id.* (citing Bennett Dep. 170:9-22; Parness Dep. 156:7-
 157:11).

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1 The “Close of Escrow” occurred on December 21, 2012. Id. (citing Bennett Dep. 43:22-
 2 24; Rice Dep. 119:12-14).

3 In relevant parts, the Purchase Agreement provides as follows:

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5 6.01 Preliminary Title Report.

6 (a) Seller, at its sole expense, and within three (3) Business Days after the
 7 Effective Date, shall cause Escrow Holder to deliver to Buyer a preliminary title
 8 report for the Property, contemplating an ALTA Extended Coverage Owner's
 9 Policy of title insurance, with a survey exception, together with a legible copy of
 10 listed title exceptions in connection with the preliminary title report (collectively,
 11 the "Title Report"). Upon Buyer's approval of its Feasibility Review Buyer shall be
 12 deemed to have approved those covenants, conditions, restrictions, rights of way,
 13 easements, reservations and other matters of record, as disclosed in the Title Report
 14 (the "Permitted Title Exceptions "); provided, however, that the Permitted Title
 15 Exceptions shall not include, and Seller shall remove at its sole expense, at or before
 16 the Close of Escrow, and shall cause the Property to be delivered and conveyed free
 17 and clear of, any and all: deeds of trusts, mortgages, mechanics' liens, notices of lis
 18 pendens, and /or other monetary liens (except only for non -delinquent taxes and
 19 assessments) whatsoever. Additionally, the Permitted Title Exceptions shall not
 20 include the matters addressed in Schedule B, Section 1 to the Title Report labeled
 21 "requirements ", and Seller shall be required to satisfy all such requirements on or
 22 before the Close of Escrow at its sole expense (to the extent reasonably applicable
 23 to Seller and not otherwise inconsistent with this Agreement), except that Seller
 24 shall not be required to obtain or provide an ALTA survey for the Property (and
 25 neither shall Buyer) or to satisfy any "requirements" that are obligations of Buyer
 26 according to the terms of this Agreement.

27

28 7.01 Conditions for the Benefit of the Buyer. Buyer's obligation to acquire
 1 the Property and to perform other obligations associated with the Close of Escrow
 2 shall be conditional and contingent upon the satisfaction, or waiver by Buyer, as
 3 and when required below, of each of the following conditions (collectively, the
 4 "Buyer Conditions"):

5

6 (a) Initial Feasibility Review.

7 (i) On or before 5:009 P.M. Nevada time on the date that is thirty (30) days
 8 after the Effective Date (the period until such date and time, the "Initial Feasibility
 9 Period"), Buyer shall have the right to review and approve the feasibility of Buyer's
 10 acquisition of the Property based on Buyer's inspection, review and analysis of the
 11 Property and Property Documents, including, without limitation, the following . . .
 12 (iv) any existing agreements or title matters related to the Property . . . and (vi) any
 13

1 other matters related to or affecting the Property desired to be reviewed and
 2 approved by Buyer[.]

3 (ii) If Buyer approves of the Initial Feasibility Review, Buyer shall provide
 4 written notice of such approval to Seller on or before the expiration of the
 5 Feasibility Period. In the event Buyer fails to approve the feasibility of Buyer's
 6 acquisition of the Property by written notice to Seller on or before the expiration of
 7 the Initial Feasibility Period, Buyer shall be deemed to have disapproved the initial
 8 Feasibility Review, in which event this Agreement shall automatically terminate,
 9 the Deposit shall be returned to Buyer, and neither Party shall have any further
 rights, duties or obligations under this Agreement, except those that by their express
 terms survive the termination of this Agreement. In the event Buyer delivers written
 notice of approval to Seller on or before the expiration of the Initial Feasibility
 Period, this Buyer Condition dealing with the Initial Feasibility Period shall be
 deemed satisfied.

10 (b) Representations and Warranties. As of the pertinent Close of Escrow,
 11 the representations and warranties of Seller set forth in this Agreement, including
 12 without limitation those set forth in Article IX below, shall be true and correct.

13 . . .

14 (d) Title Insurance. Escrow Holder shall be committed to issue to Buyer a
 15 CLTA Standard Owner's Policy of Title Insurance, with liability limits equal to the
 16 Purchase Price, insuring fee title to the Property as being vested in Buyer, subject
 17 only to the Permitted Title Exceptions (the "Title Policy"). Notwithstanding the
 18 foregoing, Buyer shall have the right to obtain an ALTA Extended Coverage
 Owner's Policy of Title Insurance in lieu of the CLTA Standard Owner's Policy of
 Title Insurance, or any required title endorsement, provided Buyer shall pay all
 excess costs in connection therewith and the costs of obtaining any necessary
 survey.

19 . . .

20 8.09 Costs and Prorations. The following shall apply: . . . (b) Property Taxes and
 21 Assessments. All non-delinquent general and special real property taxes, bonds and
 22 assessments, SID's LID's [Special/Local Improvement Districts – obligations of
 23 developer to pay for city installation of infrastructure, e.g. plumbing] (each as
 24 applicable) with respect to the Property, including, without limitation, any and all
 25 assessments with respect to any applicable association, landscape maintenance
 26 districts or assessment districts, shall be paid current at Closing by Seller and
 27 prorated through Escrow between Buyer and Seller as of the pertinent Close of
 28 Escrow based upon the latest available tax bills using customary escrow
 procedures. Further, if the regular tax bill or bills for the Property for the fiscal year
 in which the Escrow closes are not available as of the Close of Escrow, Buyer and
 Seller shall re-prorate all such general and special real property taxes, bonds and
 assessments for the Property between themselves outside of Escrow based upon the

1 then current fiscal year's regular tax bill or bills within (30) days following the date
 2 such regular tax bill or bills are actually received by the parties. This Section shall
 3 be interpreted broadly toward the end that any taxes, assessments, bond obligations,
 4 or other payment obligations accruing prior to Close of Escrow shall be the
 5 responsibility of Seller and any taxes, assessments, bond obligations, or other
 6 payment obligations accruing after the Close of Escrow shall be the responsibility
 7 of the Buyer. The provisions set forth in this Section 8.09 shall survive Close of
 8 Escrow for all purposes.

9 ...

10 16.08 Entire Agreement. This Agreement and its exhibits constitute the final and
 11 complete expression of agreement between the Parties hereto pertaining to the
 12 subject matter hereof. All prior agreements, representations, negotiations and
 13 understandings of the parties hereto, oral or written, express or implied, are hereby
 14 superseded and merged herein.

15 ...

16 16.13 Amendments. No addition to or modification of any provision contained in
 17 this Agreement shall be effective unless fully set forth in writing executed by both
 18 Buyer and Seller.

19 ECF No. 90-8 at 5-20.

20 Greystone received an ALTA Extended Coverage Owner's Policy of Title
 21 Insurance from Plaintiff. ECF No. 90-1 at 5 (citing ECF No. 72-2).

22 In 2013, the City notified Greystone (the new owner of Tuscany) that it would not
 23 issue Greystone any additional building permits for the Tuscany project unless and until
 24 someone paid the C-1 Impact Fee. Id. at 4 (citing Bennett Dep. 44:17-21; Jankowiak Dep.
 25 44:7-19; Dep. Ex. 45, ¶ 1). Greystone made a demand to Commerce that Commerce honor
 26 its obligation arising under section 8.09(b) of the Purchase Agreement by immediately
 27 paying the C-1 Impact Fee. Id. (citing ECF No. 72-3; ECF No. 76, ¶ 14; ECF No. 82, ¶
 28 14). Commerce did not respond. Id. (citing ECF No. 76, ¶ 14; ECF No. 82, ¶ 14.)

29 Greystone tendered a claim to its title insurer, First American, claiming that any
 30 loss associated with the C-1 Impact Fee was covered by the policy of title insurance issued
 31 by First American to Greystone (the "Policy"). Id. (citing ECF No. 72-2; ECF No. 76, ¶

1 13; ECF No. 82, ¶ 13; Bennett Dep. 54:2-23; Dep. Ex. 17.) The City demanded Greystone
 2 pay the full, \$934,000 C-1 Impact Fee. Id. (citing Bennett Dep. 44:22-24; Parness Dep.
 3 157:16-19). The parties ultimately made an agreement whereby the City would accept
 4 \$300,000 in full satisfaction of any obligation that Greystone might have to pay the C-1
 5 Impact Fee. Id. (citing ECF No. 72-4; ECF No. 76, ¶ 15; ECF No. 82, ¶ 15; Bennett Dep.
 6 165:2-13; Fullmer Dep. 23:20-24:20; Parness Dep. 157:20-158:20). First American
 7 accepted Greystone's title insurance claim, and ultimately paid the sum of \$300,000 to
 8 fully resolve and settle the matter with the City. Id. at 4-5 (citing Bennett Dep. 54:21-23,
 9 72:1-17, 91:3-13; Fullmer Dep. 23:20-24:20; Dep. Ex. 33) (noting Deposition Exhibit 33
 10 is the City's receipt for \$300,000 tendered by First American).

11 Condition 13 of the Policy recites as follows:

12 13. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT
 13 (a) Whenever the Company shall have settled and paid a claim under this policy, it
 14 shall be subrogated and entitled to the rights of the Insured Claimant in the Title
 15 and all other rights and remedies in respect to the claim that the Insured Claimant
 16 has against any person or property, to the extent of the amount of any loss, costs,
 17 attorneys' fees, and expenses paid by the Company. If requested by the Company,
 18 the Insured Claimant shall execute documents to evidence the transfer to the
 19 Company of these rights and remedies. The Insured Claimant shall permit the
 20 Company to sue, compromise, or settle in the name of the Insured Claimant and to
 21 use the name of the Insured Claimant in any transaction or litigation involving these
 22 rights and remedies.

23 If a payment on account of a claim does not fully cover the loss of the Insured
 24 Claimant, the Company shall defer the exercise of its right to recover until after the
 25 Insured Claimant shall have recovered its loss.

26 (b) the Company's right of subrogation includes the right of the Insured to
 27 indemnities, guaranties, other policies or insurance, or bonds, notwithstanding any
 28 terms or conditions contained in those instruments that address subrogation rights.

24 Id. at 5 (citing ECF No. 72-2 at 4-5).

25 Defendant Gonzales is presently the sole member of Commerce. ECF No. 90-1
 26 (citing ECF No. 76, ¶ 4; ECF No. 82, ¶ 4). Commerce's sole business was the development
 27 of the Tuscany project. Id. at 5-6. (citing Gonzales Dep. 23:6-14, 25:7-16; 125:9-13). After
 28 Commerce sold its stake in Tuscany to Greystone, Commerce distributed its remaining

1 assets. Id. at 6 (citing ECF No. 76, ¶ 19; ECF No. 82, ¶ 19). Commerce instructed First
 2 American to wire the \$9,248,734.07 it was to receive from Greystone through the close of
 3 escrow to its attorney's trust account. Id. Commerce's counsel retained \$30,734.07 for
 4 legal fees. Id.

5 On December 24, 2012, Commerce's counsel then distributed \$5,500,000 of the
 6 sales proceeds to a Florida-based escrow company, Capstone Title Partners. Id. The
 7 purpose of this wire was to fund a settlement between Gonzales and a lender to exonerate
 8 Gonzales from a \$5.5 million personal guaranty of a loan which was unrelated to
 9 Commerce. Id. at 6 (citing Gonzales Dep. 133:22-134:8, 136:12-138:7; Dep. Ex. 68)
 10 (noting Dep. Ex. 68 is a settlement agreement and release between Gonzales and the lender
 11 which made the loan guaranteed by Gonzales).

12 On January 22, 2013, Commerce's counsel distributed \$1,725,000 of the sales
 13 proceeds to Bridge Financial, LLC. Id. (citing ECF No. 76, ¶ 19; ECF No. 82, ¶ 19).

14 On February 8, 2013, Commerce's counsel wired \$1,893,000 of the sales proceeds
 15 to Woods & Associates Yacht Brokerage, Inc. Id. The wire to Woods & Associates Yacht
 16 Brokerage, Inc. was not made by Commerce. Id. at 6 (citing Gonzales Dep. 122:7-123:5).

17 On March 11, 2013, Commerce's counsel wired the last \$100,000 of its assets to a
 18 Merrill Lynch account owned and controlled by Defendant TG Investments, LLC. Id.
 19 (citing ECF No. 76, ¶ 19; ECF No. 82, ¶ 19).

20 On January 9, 2013, the City contacted Commerce to inquire regarding the status
 21 of the C-1 Impact Fee, as it could not find any evidence that the C-1 Impact Fee had been
 22 paid. Id. (citing Jankowiak Dep. 31:8-12; Dep. Ex. 42). Commerce did not respond to the
 23 City's inquiry. Id. (citing Jankowiak Dep. 34:22-35:14; Dep. Ex. 43.) Commerce presently
 24 has less than \$934,000 in assets Id. (citing Commerce Response to Request for Admission
 25 No. 5).

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IV. LEGAL STANDARD

28 Summary judgment is appropriate when the pleadings, depositions, answers to

1 interrogatories, and admissions on file, together with the affidavits, if any, show “that there is no
 2 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
 3 Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering
 4 the propriety of summary judgment, the court views all facts and draws all inferences in the light
 5 most favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir.
 6 2014). If the movant has carried its burden, the non-moving party “must do more than simply show
 7 that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole
 8 could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for
 9 trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal quotation marks
 10 omitted). It is improper for the Court to resolve genuine factual disputes or make credibility
 11 determinations at the summary judgment stage. Zetwick v. Cty. of Yolo, 850 F.3d 436, 441 (9th
 12 Cir. 2017) (citations omitted).

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V. DISCUSSION

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Plaintiff moves for summary judgment on its breach of contract claim, and in the alternative on a claim of unjust enrichment. While in the initial briefing the parties argued the issue as to whether Plaintiff as insurer was the subrogee of the insured Greystone’s rights under the Purchase Agreement, at the hearing in February, Defendants stated they were “not arguing there’s no subrogation.” ECF No. 157 at 80. Therefore, in deciding the instant motion and for the duration of this action, the Court considers Defendants’ prior argument withdrawn and assumes Plaintiff has subrogated to non-party Greystone’s rights against Commerce. Further, the Court reiterates its ruling from the bench at the February hearing that Plaintiff has failed to adequately plead a claim for fraudulent transfer and therefore does not consider that argument as made in the original briefing. Therefore, the instant discussion considers Plaintiff’s breach of contract and unjust enrichment claims, as well as Plaintiff’s claim that Defendants Gonzales and TG Investments, LLC are joint and severally liable for Commerce’s alleged debts pursuant to a theory of alter ego liability.

1 **A. Breach of Contract**

2 Beginning with the breach of contract claim, Plaintiff asserts that Commerce violated the
 3 terms of the Purchase Agreement by refusing to pay the C-1 Impact Fee, which was a debt arising
 4 before the Close of Escrow. Defendants' opposition focuses on the negotiations of the title
 5 commitment insurance policy between Plaintiff and Greystone, and the Purchase Agreement
 6 between Greystone and Defendant Commerce. Specifically, Defendants discuss testimony
 7 illustrating that First American initially refused to remove Exception 37, an exception for the C-1
 8 Impact Fee, but ultimately did so right before finalizing the insurance agreement because it
 9 believed that the obligation was no longer valid/operative. Defendants also discuss testimony
 10 showing a dispute as to whether Greystone requested, and Defendant Commerce refused, to
 11 indemnify Greystone for any losses associated with Exception 37. Plaintiff does not dispute this
 12 testimony but argues it is irrelevant to its breach of contract claim under a contract with a whole
 13 agreement/integration clause, where the plain language obligates Commerce for a kind of debt that
 14 would include the C-1 Agreement.

15 “Basic contract principles require, for an enforceable contract, an offer and acceptance,
 16 meeting of the minds, and consideration.” May v. Anderson, 119 P.3d 1254, 1257 (Nev. 2005)
 17 (citation omitted). Breach of contract is “a material failure of performance of a duty arising under
 18 or imposed by agreement.” Bernard v. Rockhill Dev. Co., 734 P.2d 1238, 1240 (Nev. 1987)
 19 (citation omitted). A breach of contract claim under Nevada law requires (1) the existence of a
 20 valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach. Rivera v.
 21 Peri & Sons Farms, Inc., 735 F.3d 892, 899 (9th Cir. 2013) (quoting Saini v. Int'l Game Tech., 434
 22 F. Supp. 2d 913, 919–20 (D. Nev. 2006) (citing Richardson v. Jones, 1 Nev. 405, 409 (1865)).
 23 Where “a written contract is clear and unambiguous on its face, extraneous evidence cannot be
 24 introduced to explain its meaning. Extrinsic or parol evidence is not admissible to contradict or
 25 vary the terms of an unambiguous written instrument, since all prior negotiations and agreements
 26 are deemed to have been merged therein.” Klabacka v. Nelson, 394 P.3d 940, 949 (Nev. 2017)
 27 (internal citations and quotation marks omitted).

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1 Plaintiff argues that the plain language of section 8.09(b) of the Purchase Agreement,
 2 making any “payment obligations” accruing prior to the Close of Escrow the “responsibility of
 3 [Commerce],” which were to be “paid current at Closing by [Commerce],” meant that Commerce
 4 was obliged to pay the C-1 Impact Fee, of which the City of Henderson demanded payment prior
 5 to granting additional construction permits to Greystone. Pursuant to the C-1 agreement, payment
 6 was due in two installments in 2005. Therefore, the agreement was breached at closing of the sale
 7 of Tuscany from Commerce to Greystone and remained breached when the City withheld the
 8 permits pending payment, and Commerce ignored Greystone’s demand to pay the fee.

9 Defendants make several arguments in opposition. In the original briefing, Defendants
 10 argued that the C-1 Impact Fee does not fall within the scope of section 8.09(b), as “impact fees”
 11 are nowhere mentioned in the section, and that “other payment obligations” should not be
 12 construed to include the fee. Defendants contest the relevance of the testimony of Stephen Rice
 13 (Defendant Commerce’s counsel for the Purchase Agreement), admitting that Commerce was
 14 obligated to pay the C-1 Impact Fee through an agreement made prior to the sale, reciting
 15 testimony in which he argues that section 8.09 is titled, “Costs and Prorations,” and 8.09(b) is titled
 16 “Taxes and Assessments,” and that an “impact fee” owed to the City would not fall within these
 17 categories. Moreover, because of the request and refusal regarding the indemnity mentioned *supra*,
 18 Defendant Commerce did not intend to obligate itself to pay the Impact Fee.

19 The Court finds that any obligation to pay the C-1 impact fee—arguments as to
 20 Defendants’ assertion that the non-existence or expiration of the obligation will be addressed
 21 *infra*—falls squarely within the plain language of section 8.09(b). In light of the plain language of
 22 the section which defines its terms in detail, the section titles cannot be used to argue that the C-1
 23 Impact Fee falls outside the provision’s scope. Indeed, the section includes language cautioning
 24 against such an interpretive approach; it states that the section “shall be interpreted broadly toward
 25 the end that any taxes, assessments, bond obligations, or other payment obligations accruing prior
 26 to the Close of Escrow,” are the responsibility of the buyer to be paid prior to closing. ECF No.
 27 90-8 at 11. The unambiguous intent is to require that any debts owed and attached to the property
 28 that accrued prior to the sale, were to be paid by Commerce. Moreover, the section explicitly

1 references SIDs and LIDs, analogous obligations whereby a developer is obligated to pay for
 2 infrastructure improvements made by the city. In light of the lack of ambiguity in the section, the
 3 parol evidence rule bars consideration of the context of negotiation, including any offer or refusal
 4 regarding an indemnity agreement. Klabacka v. Nelson, 394 P.3d at 949. The Court therefore
 5 finds that Defendants' reliance in opposition on facts surrounding the negotiation of the Purchase
 6 Agreement and the title insurance policy is not only inapposite, but that those facts are barred from
 7 consideration as extraneous evidence, given the "clear and unambiguous" terms of section 8.09(b).

8 Regarding whether the obligation to pay the C-1 Impact Fee remained, Defendants argue
 9 that the Impact Fee was unenforceable because of the contract statute of limitations, and therefore
 10 does not fall within section 8.09(b).

11 The statute of limitations for an action upon a contract is six years. NRS 11.190(1)(b). "The
 12 defense of limitations, as we all know, is one which it is the privilege of the debtor to make or not,
 13 as he pleases. The law does not make it for him, nor does the law pronounce any debt extinguished
 14 by virtue, merely, of the lapse of the statutory period. The debt continues the same, and may be
 15 collected or reduced to judgment, unless the defense of the statute of limitations be interposed."
 16 Blair v. Silver Peak Mines, 84 F. 737 (Circuit Court, D. Nev. 1898).

17 Defendants argue that the six-year statute of limitations began to run when the payment
 18 was owed, in two payments due on May 31, and November 30, 2005. Therefore, after November
 19 29, 2011, the City's cause of action against Commerce for nonpayment was barred. Plaintiffs note
 20 that the Court, in denying Defendant's Motion to Dismiss, already raised the possibility that the
 21 obligation might, like a lien, run with the land, or could otherwise exist, or be enforced, outside of
 22 the contract action that might bar enforcement in a contract cause of action in a court. Plaintiff
 23 notes that it is undisputed that the City of Henderson did in fact seek to enforce the obligation, by
 24 requiring payment of the fee prior to issuing Greystone building permits to complete the project.

25 The underlying agreement between Commerce and the City of Henderson made clear that
 26 the C-1 Impact Fee was meant to offset the impact of the development on water draining. See ECF
 27 No. 90-10 at 6 (discussing in section 3.1 of the agreement the impact of water drainage from the
 28 Tuscany on the Las Vegas Wash and describing the sum of \$934,000 as an "appropriate

1 contribution” to offset this effect). Moreover, the agreement conditioned the completion of
 2 construction on “the approval of the Phase 3 Plans by the City of Henderson and the payment by
 3 Commerce of fees and placement of bonds.” *Id.* at 6. While the amount of the fee may have been
 4 determined by the contract between Commerce and the City, the authority to impose and enforce
 5 the fee for development did not derive from the contract. Rather, the City has the regulatory
 6 authority as a municipality to impose such obligations consistent with the development of land
 7 within its jurisdiction. *See generally, Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992)
 8 (Recognizing the state’s authority to impose regulations with respect to property and commercial
 9 dealings). Such authority is not subject to a statute of limitations on a contract claim as it does not
 10 arise from a contract but from the traditional regulatory power of the municipality. *Id.* Defendants’
 11 focus on the statute of limitations related to a contract action is misplaced and irrelevant. The City
 12 maintained that an obligation existed associated with the land and had the authority to impose and
 13 enforce such an obligation. It was therefore an obligation that Commerce was bound to pay
 14 pursuant to section 8.09(b).

15 Defendants also argue that “the evidence shows that the risk of loss associated with
 16 nonpayment of the impact fee should be allocated to Greystone or First American. Defendants
 17 argue that the evidence regarding the last-day removal of the C-1 Impact Fee exception from the
 18 title insurance contract, and the offer and decline for indemnity for the fee, may be considered with
 19 reference to section 7.01 of the Purchase Agreement, “Conditions for the Benefit of the Buyer”
 20 (cited in section III, *supra*).

21 Defendants assert that the feasibility review implies that where there is evidence of
 22 knowledge of and failure to explicitly contract to indemnify an obligation, the Buyer has “assumed
 23 the risk,” which somehow negates Plaintiff’s claim. Conversely, Plaintiff relies on the explicit
 24 language of section 8.09(b), which makes clear that any prior-accrued obligation “shall survive
 25 Close of Escrow for all purposes.” The Court does not find that section 7.01 was intended to
 26 supplant any obligation to pay arising under section 8.09(b). Rather, section 7.01 serves as an
 27 added opportunity for the Buyer to be able to review all of the documents and details of the
 28 agreement and decide to withdraw from the agreement. As such, section 7.01, clearly intended to

1 provide for a probationary period and a mechanism for the Buyer to withdraw, does not affect the
 2 debt or override the clear intention of section 8.09(b) that Seller retains the responsibility for all
 3 prior-accrued debts, even after the Close of Escrow. The Court is not persuaded by Defendants'
 4 argument in their supplemental brief that such a plain reading of section 8.09(b) "renders nugatory
 5 the Initial Feasibility Review and the approval or waiver of title matters provisions found in §6.01
 6 and §7.01." ECF No. 160 at 10. Indeed, the opposite is true; the Defendants' proffered
 7 interpretation would render nugatory section 8.09(b). Nor, as discussed *supra*, does the Court find
 8 persuasive Defendants' contention that "other payment obligations accruing prior to the Close of
 9 Escrow" must be limited to "those items that may be similar in nature to taxes, assessments and
 10 bond obligations" merely because the provision is entitled "Property Taxes and Assessments." *Id.*
 11 at 11.

12 The Court therefore finds that there is no genuine dispute of material fact that Commerce
 13 violated section 8.09(b) of the Purchase Agreement by failing to pay the C-1 Impact Fee, which
 14 constituted a "payment obligation[] accruing prior to the Close of Escrow," and therefore that
 15 summary judgment is warranted on Plaintiff's breach of contract claim. The Court therefore grants
 16 Plaintiff's summary judgment motion with respect to its breach of contract claim.

17 Furthermore, as an action based on a theory of unjust enrichment is not available when
 18 there is an express, written contract, because no agreement can be implied when there is express
 19 agreement, Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975, 942 P.2d 182,
 20 187 (Nev. 1997), the Court denies the motion without prejudice as to Plaintiff's alternative unjust
 21 enrichment claim.

22 Regarding the amount of damages, while Plaintiff asserted in the original motion that the
 23 Collateral Source Rule permitted Plaintiff to recover \$934,000, the amount of the C-1 Impact Fee
 24 originally owed by Commerce to the City pursuant to the prior agreement (rather than the \$300,000
 25 actually paid by Plaintiff to satisfy this obligation), in its supplemental brief, Plaintiff waives this
 26 argument and seeks only \$300,000, subject to its right to bring a motion for contractual attorneys'
 27 fees and related expenses. ECF No. 159 at 6. The Court is not persuaded by Defendants' argument
 28 that Plaintiff failed to mitigate damages because the negotiation with the City of Henderson

1 permitted Greystone to either pay a one-time lump sum payment of \$300,000, or \$341,000 at the
 2 rate of \$1,000 per residence at closing, effectively passing off the cost to each home buyer. This
 3 argument is inapposite, since First American was obligated pursuant to its insurance contract with
 4 Greystone to pay the impact fee. That it chose to pay \$300,000 instead of \$341,000 is evidently
 5 fatal to Defendants' contention that Plaintiff did not mitigate its damages.

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B. Alter Ego Liability

8 The remaining issue concerns liability for Plaintiff's damages incurred as a consequence
 9 of Commerce's breach. Plaintiff seeks summary judgment as to its alter-ego liability claim against
 10 Defendants TG Investments, LLC and Gonzalez.

11 "Nevada has long recognized that although corporations are generally to be treated as
 12 separate legal entities, the equitable remedy of 'piercing the corporate veil' may be available to a
 13 plaintiff in circumstances where it appears that the corporation is acting as the alter ego of a
 14 controlling individual." LFC Marketing Group, Inc. v. Loomis, 8 P.3d 841, 845 (Nev. 2000)
 15 (citation omitted). "Indeed, the 'essence' of the alter ego doctrine is to 'do justice' whenever it
 16 appears that the protections provided by the corporate form are being abused." Id. at 845-46
 17 (citation omitted).

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The Supreme Court of Nevada has outlined the contours of alter ego liability:

The elements for finding an alter ego, which must be established by a preponderance of the evidence are: (1) the corporation must be influenced and governed by the person asserted to be the alter ego; (2) there must be such unity of interest and ownership that one is inseparable from the other; and (3) the facts must be such that adherence to the corporate fiction of a separate entity would, under the circumstances, sanction [a] fraud or promote injustice.

Id. at 846-47 (citations and internal quotations omitted).

"Further, the following factors, though not conclusive, may indicate the existence of an alter ego relationship: (1) commingling of funds; (2) undercapitalization; (3) unauthorized diversion of funds; (4) treatment of corporate assets as the individual's own; and (5) failure to

1 observe corporate formalities.” Id. at 847 (citations omitted). The Supreme Court of Nevada has
2 “emphasized, however, that [t]here is no litmus test for determining when the corporate fiction
3 should be disregarded; the result depends on the circumstances of each case.” Id. (citations and
4 internal quotations omitted).

5 Plaintiff argues the undisputed facts as to events occurring after the sale of Tuscany by
6 Commerce to Greystone establish alter ego liability. Defendants do not contest the asserted facts
7 as to the wire transfers but argue that “disbursements to the owners of a business” do not establish
8 alter ego liability. Defendants argue that Gonzalez invested at least \$60 million into the project
9 and had a “right” to recoup some of that investment back. Defendants further argue that Gonzalez
10 never had a managerial role in Commerce; and that the managers of Commerce, not Gonzalez,
11 signed the C-1 Channel Phase 3 Agreement.

12 The Court finds that there is a genuine dispute of material fact as to alter ego liability.
13 These facts show numerous transfers personally benefiting Gonzalez, the sole member of
14 Commerce, in the months following the sale, in spite of a potential debt of which all Defendants
15 would have been aware. However, these facts are not inconsistent with the winding down of a
16 closely held corporation that no longer has a productive purpose. Therefore, the Court will deny
17 summary judgment as to alter ego liability for Gonzalez and TG Investments, LLC and schedule
18 an evidentiary hearing to determine whether they may be held joint and severally liable for
19 Commerce’s breach.

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1 **VI. CONCLUSION**

2 **IT IS THEREFORE ORDERED** that summary judgment in favor of Plaintiff on its
3 breach of contract claim is **GRANTED** as discussed in this order. Summary judgment is **DENIED**
4 without prejudice as to Plaintiff's unjust enrichment claim.

5 **IT IS FURTHER ORDERED** that the Court will hold an evidentiary hearing to determine
6 alter ego liability for Defendants Gonzales and TG Investments, LLC, to be scheduled at the status
7 hearing in this action on July 14, 2020 at 11:00 AM.

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9 DATED: June 8, 2020.

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RICHARD F. BOULWARE, II
12 UNITED STATES DISTRICT JUDGE

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